

MEMORANDUM

TO: The Commission to Examine Racial Inequity in Virginia Law

FROM: Andrew Block, Kelsey Massey, Juliet Buesing, Christopher Yarrell, Wes Williams, and Trust Kupupika

RE: Policy Recommendations for Commission's Consideration

DATE: May 19, 2020

INTRODUCTION

This memorandum ("memo") is intended to supplement the PowerPoint presentation on racial disparities to the Commission to Examine Racial Inequity in Virginia Law (the Commission) by Vice-Chair Andrew Block, and University of Virginia School of Law students Kelsey Massey, Juliet Buesing, Christopher Yarrell, Wes Williams, and Trust Kupupika. It reflects the views of the authors and not those of the University of Virginia, or the University of Virginia School of Law.

These policy recommendations are not exhaustive. For example, given the directive of the Executive Order establishing the Commission to consider changes to laws or regulations, the recommendations mention some potential budget actions when they connect to legislative changes, but otherwise do not include potential budget actions. In addition, we recognize that the 2020 General Assembly session was an active one in many of the areas covered in our presentation. Accordingly, we have tried to list below relevant actions taken this session. Note that a common theme across subject areas is a need for policy makers to have better statewide data about racial and ethnic disparities.

We encourage Commission members to view these policy recommendations as worthy of serious consideration in their own right, but also as illustrative of the kinds of changes that the Commission might propose the Northam administration consider supporting. Indeed, given the subject area expertise of members of the Commission we expect and hope that these recommendations will generate other policy proposals from the Commission members themselves that may go well beyond what is proposed here.

Lastly, we note that the recommendations in this memo do not specifically address the ongoing coronavirus crisis. However, given the disproportionate harm the pandemic is causing communities of color (which we show in the accompanying slides), we recommend that disparities in health generally, and in Covid-19 impact specifically, become additional areas of focus and inquiry for the Commission.

HOUSING

This section provides a more detailed look at the recommendations from the housing portion of the presentation. It is useful to note that there is a scarcity of state-wide data to inform policy decisions. There is, however, a plethora of city-specific information that tracks with the overall housing story being told about the region. All policy suggestions here have elements of broadness to account for the nature of the data.

This session many bills **successfully passed** that will aid in reducing housing discrimination, housing supply, and disparate impacts. These statutes include:

- Preventing source of funds being used as a proxy/basis for discrimination by landlords with a smaller quantity of rental housing. This protects renters who use federal or state programs to finance their housing (HB 6).
- Prohibiting discrimination based on a tenant's status as a victim of family abuse (HB 99).
- Requiring legal aid information to be included in any termination of tenancy (HB 519).
- Limiting fees for late payment of rent (HB 1420).
- Creating a stakeholder advisory group to provide recommendations on starting a Virginia housing opportunity tax credit program to fund affordable housing construction (HB 810).
- Allowing certain localities to adopt affordable housing unit dwelling ordinances (HB 1101).
- Allowing localities to i) establish jurisdiction-wide affordable housing prices ii) establish jurisdiction-wide affordable housing income guidelines, and iii) offer incentives other than density increases to encourage provisions of affordable housing (SB 834).
- Requiring legal aid information to be added to lease termination notices (HB 329).
- Creating a tenant bill of rights (HB 393).

POLICY RECOMMENDATIONS

[Address Gaps in Data.](#)

BACKGROUND: There are large discrepancies in the narrative that housing advocates tell and what data shows statewide. This is primarily thought to be a result of both a lack of documentation and a lack of analysis on the available data.

RECOMMENDATIONS: In particular, these are areas of concern that lack analysis:

- Home Quality
- Forms of discrimination in the home buying process
- Effects of modern-day zoning
- Discrimination committed by lenders in Virginia

- Black landowner (including farmers) land loss and over-assessment of taxes historically

Change zoning and increase affordable housing share requirements.

BACKGROUND: Exclusionary zoning and historical zoning practices are known to enable cities to gentrify and exclude certain residents. This area is lacking legal protections rather than having explicitly discriminatory codified practices. Recent positive steps in this area include Executive Order 25 (2018) which acknowledged the need for affordable housing and created the goals of increasing permanent supportive housing, addressing the shortage of quality affordable housing, and reducing the rate of evictions.¹

RECOMMENDATIONS: This can be mitigated by adopting inclusionary zoning laws. Examples of such legal changes could be increasing the density of housing, requiring localities to have a certain percentage of affordable housing, lowering lot size requirements, and/or enacting other statutory or regulatory changes that allow lower income people to move into a locality. Additionally, affordable rental unit stock issues can be decreased by promoting lower-income home ownership through subsidized lending, building efforts, community land trusts, and other methods. These changes would also mitigate the wealth building discrepancies faced by people of color.

There are various laws and programs in place that can be strengthened or amended to accomplish such purposes. The important factor to consider here is long-term solutions that extend beyond initial subsidies.² More specific recommendations include:

- Provide assistance and education to local governments in making effective inclusionary zoning decisions.
- Add affordable housing explicitly to the allowed public uses for exercise of eminent domain. Denver, for example, uses a housing fund to fill vacant apartments with those in need of housing. Other cities have revitalized vacant motels for affordable housing units.
- HB 152, which did not make it through the House this session, is an example of a policy that could have a strong impact on the share of affordable housing. The bill allowed for “middle housing,” or the building of duplexes, townhouses, cottages, and similar structures on all lots zoned for single family housing.
- Similarly, SB 97 was continued until next term by the House but would prohibit any political jurisdiction or its employees from discriminating in land use decisions involving developments with affordable housing shares.
- HB 31 "Commonwealth-wide housing needs; Department of Housing and Community Development to Study" was left in Rules but would be a positive step forward. This bill was written to have DHCD research the existence and quality of affordable housing,

¹ “Executive Order Number Twenty-Five: Establishing the Governor’s Affordable Housing Priorities To Address Virginia’s Unmet Housing Needs,” Commonwealth of Virginia Office of the Governor, 2018.

² A list of important policy solutions has been curated by Partnership for Housing Affordability at www.pharva.com/framework/solutions/#1578074402301-38e30ab9-a8f8.

review of relevant programs, development a projection of future needs, and make recommendations for the housing policy in the Commonwealth. Bills such as this that require agencies to leverage resources to ensure the best policies are created with adequate information are important to ensure this issue is addressed comprehensively and wisely.

- Finally, Community Land Trusts could be an effective state policy to stem gentrification and provide a pathway to homeownership. These trusts retain ownership to the land but sell the homes on the land at affordable rates. The homes are also required, if they are sold, to be sold at an affordable price through a 99-year ground lease. The Northern Virginia Community Land Trust and Maggie Walker Community Land Trust in Richmond are existing examples of this solution.

Create housing stability through eviction protections.

BACKGROUND: While a number of efforts have been implemented in the last year and this session, evictions are the clearest area of disparate impact in Virginia’s housing.³ HB 2655 was passed in the 2019 legislative session, creating an eviction diversion pilot program in Danville, Hampton, Petersburg, and Richmond. It goes into effect on July 1, 2020 and is anticipated to be an effective aid to stem evictions.

RECOMMENDATIONS: Potentially effective policy suggestions include establishing emergency rental assistance platforms, expanding social worker and case manager support, educating landlords, providing post-eviction support and in-court support, creating or expanding eviction diversion programs, and establishing a rental repair fund.⁴ While these are some examples of ways to tackle evictions in the short term, providing affordable housing is likely the most well-accepted long-term solution to stem high eviction rates.

However, to solve the immediate problem and provide equitable treatment, the Commission may consider reconfiguring the broad rights of landlords to evict tenants in the commonwealth and how that places people of color generally in precarious positions. Specifically:

- Increase the access to counsel for those facing eviction.
- Severely limit the fees landlords may impose during an eviction proceeding and create stricter guidelines so it is not as easy to file an eviction proceeding.

³ Central Virginia Legal Aid Society, “7 New Laws that are More Fair, Favorable and Friendly to Tenants,” www.reduceevictions.org/wp-content/uploads/2019/04/new-landlord-tenant-laws-0319.pdf.

⁴ Tayla Lockman-Fine and Olivia Rosenthal, “Evictions in Richmond: Overview, Current Responses, and Program Proposals,” August 2019.

EDUCATION

This section discusses the education policy recommendations offered in the presentation. While these recommendations focus exclusively on education, we are mindful that many factors outside the school house can have a big impact on the classroom success of students.

To begin, we note some of the most important education-related policy changes that **successfully passed the 2020 General Assembly**, including those predicted to be signed by Governor Northam:

- Repeal of Disorderly Conduct statute criminalizing classroom misbehavior (HB 256)
- Repeal of laws requiring principals to report school-based misdemeanors to the police (HB 257)
- Prohibition on school meal debt discrimination or punishment (HB 697, 698, 703)
- Creation of guidelines to ensure dress codes are not racially biased (HB 837)
- Authorization of a Cultural Relevancy Committee to review social history standards (HB 916)
- Required learning access during suspensions (HB 415)
- Certain extensions to provisional license periods for teachers in high-needs areas (multiple bills)
- Required training for school resource officers (HB 1419)
- Transparency in MOUs between law enforcement and school districts (HB 292)

POLICY RECOMMENDATIONS

Facilitate school integration.

BACKGROUND: Substantial research supports the idea that, in addition to the social benefits of diversity, integration makes a positive difference in student outcomes. Students in integrated schools are less likely to drop out and more likely to enroll in college. They have higher overall test scores and smaller achievement gaps. And these benefits don't just accrue to minority students: all students benefit from diverse environments.⁵ Schools in Virginia are increasingly isolated by race and socioeconomic status, with the number of highly segregated high poverty schools nearly doubling in the last twenty years.⁶ In fact, Virginia has never made state efforts toward integration—quite the opposite. Instead, Virginia has both perpetuated and protected segregation in the last 60 years.

RECOMMENDATIONS:

⁵ <https://tcf.org/content/facts/the-benefits-of-socioeconomically-and-racially-integrated-schools-and-classrooms/?session=1>

⁶ <https://www.thecommonwealthinstitute.org/2016/11/04/increasingly-separate-and-unequal-in-u-s-and-virginia-schools/>

1. **Repeal 22.1-25 (A) 1-3.**⁷ This statutory language strictly limits the power granted to the Board of Education under the Virginia Constitution to draw school zone lines that “promote the realization of the standards of quality.”⁸ Instead, it preserves the boundaries created by division lines in the 1970s, after *Milliken v. Bradley*, the decision that forbade integration plans that crossed district lines, effectively protecting segregation created by families who had moved to avoid integration. The statute prevents regional solutions to school segregation and exacerbates problems caused by housing and wealth inequity. Note that there are no other statutes currently on the books regulating student assignment or school zone drawing within districts.
2. **Incentivize and facilitate integration programs** such as controlled choice zoning, magnet schools, and metro-wide agreements. There are many models to use. For example, the merged city-suburban school district of Louisville and Jefferson County in Kentucky started controlled choice in the 1990’s. The school district has been able to meet diversity goals for the vast majority of its schools while receiving broad support from parents and students. Other examples include Hartford’s magnet school programs, which draw suburban students in and send urban students out to nearby districts, and the METCO program in Massachusetts (in which the state covers transportation and other costs for underprivileged students from inner-city Boston to fill empty seats in suburban schools). METCO also provides wraparound services such as social worker counseling and college visits. Another model of regional funding is Omaha’s “Common Levy,” which helps achieve equity in school funding by sending more money where it is most needed.⁹

Recruit and retain more teachers of color.

BACKGROUND: We know that teacher diversity has a huge impact on student outcomes. One study showed that minority students who had a teacher from their own background during elementary school were 7% more likely to graduate from high school and 13% more likely to enroll in college.¹⁰ Teachers of color serve as role models, effective educators, and valuable signals of the importance of education and diversity. While half of Virginia’s students are children of color, nearly 80% of Virginia teachers are white. In fact, while the proportion of

⁷ Current Virginia Code § 22.1-25(A) 1-3. How School Divisions Made. ... 1. The school divisions as they exist on July 1, 1978, shall be and remain the school divisions of the Commonwealth until further action of the Board of Education taken in accordance with the provisions of this section except that when a town becomes an independent city, the town shall also become a school division. 2. No school division shall be divided or consolidated without the consent of the school board thereof and the governing body of the county or city ... 3. No change shall be made in the composition of any school division if such change conflicts with any joint resolution ...of the General Assembly ...

⁸ The Constitution of Virginia, Article VIII, Section 5(a) reads as follows: Section 5. Powers and duties of the Board of Education. The powers and duties of the Board of Education shall be as follows: (a) Subject to such criteria and conditions as the General Assembly may prescribe, the Board shall divide the Commonwealth into school divisions of such geographical area and school-age population as will promote the realization of the prescribed standards of quality, and shall periodically review the adequacy of existing school divisions for this purpose. (emphasis added)

⁹ https://learningpolicyinstitute.org/sites/default/files/product-files/Sharing_The_Wealth_REPORT.pdf

¹⁰ <https://www.nber.org/papers/w25254.pdf> ; see also <http://educationnorthwest.org/resources/resources-recruiting-hiring-and-retaining-teachers-color>

students of color continues to rise, the proportion of teachers of color has fallen in recent years. We must reverse this trend. This problem is one of both recruitment and retention. Only a quarter of individuals in Virginia's teacher preparation programs are individuals of color. In addition, Virginia loses nearly one fifth of its teachers of color every year (compared to 15% of white teachers) in high turnover. Teachers of color with provisional licenses, particularly Black teachers, are significantly less likely to complete the requirements and remain teachers long term (63% for Black teachers compared to around 75-80% for other races).¹¹

RECOMMENDATIONS:

1. **Mandate data collection and reporting.** We recommend that VDOE or the Board of Education annually collect and publish district-level data on teacher diversity at each stage of the teacher pipeline, including recruitment, application, hiring, and retention. This can be mandated by statute, for example at § 22.1-290.01(C), where the Teacher Loan program is established.
2. **Support recommendations by the Taskforce on Diversifying Virginia's Educator Pipeline** including: (1) VDOE approval of a 4-year Bachelors-to-licensure program; (2) VDOE creation of a model "Grow-Your-Own" program for districts to implement voluntarily. While not a goal of this presentation, we also include the recommendations that would require state budgetary changes: (3) Increased state funding for teacher compensation in high-needs schools, scholarships for Praxis and other licensure exams, stipends for student teachers, and expansion of the teacher loan program; and (4) state investment in marketing programs to recruit more minority teachers.

Advocate for expanded early childhood education.

BACKGROUND: According to the Center for Disease Control (CDC), for every \$1 spent on a state or district early childhood education program, \$3 to \$5 worth of benefits follow.¹² Not only do students have better academic outcomes in the first few years of schooling, they have better long-term outcomes, including reductions in criminal offenses and increased health benefits. Pre-K is also associated with reductions in poverty and increases in maternal employment. While Virginia has made progress in recent years, and especially this session, on expanding access to early childhood education, challenges in terms of equity and access remain. One of the solvable problems is a lack of data. Because Virginia's early childhood education system is so fragmented—between home-grown daycare, Federal Head Start, state VPI, and private preschools—researchers do not have a clear picture of where disparities are or how to make improvements. In addition, kindergarten teachers lack information on the abilities of their entering students.

RECOMMENDATIONS:

¹¹ <https://www.education.virginia.gov/media/governorviriniagov/secretary-of-education/pdf/final-tdvrep-report.pdf>

¹² <https://www.cdc.gov/policy/hst/hi5/earlychildhoodeducation/index.html>

Some progress
in expanding
this data system
made in 2020

1. **Support the governor's initiative to unify the Pre-K data system and create Pre-K student identifiers.** Identifying and researching Pre-K disparities is essential to the work of the Commission. The Commission should therefore support efforts to unify the Pre-K data collection system by assigning student identifiers to younger children, specifically those not in state-run Pre-K programs.¹³ This will allow us to know where students are getting Pre-K experiences, what those experiences are like, how much Pre-K they have, and how their kindergarten-readiness relates to those experiences.
2. **Support increased access to high quality pre-kindergarten programs for all children,** and support efforts toward integration in those programs. Universal Pre-K is one of the most powerful long-term investments Virginia could make, and increasing both access and quality is essential.

Advocate for more equitable school finance reform.

BACKGROUND: According to at least two national research centers, Virginia ranks poorly— near the bottom of the 50 states—in the equity of its state educational funding scheme.¹⁴ In 2015, Virginia's highest-poverty districts students received 7 percent fewer dollars overall than their peers in the lowest-poverty districts, one of the largest of such disparities nationwide.¹⁵ These school funding disparities are more pronounced when assessing race and ethnicity data, with districts serving the most students of color receiving 8 percent less funding from the state.¹⁶ As the Commonwealth's school-aged population continues to grow and diversify, one of the chief problems for government leaders becomes reassessing how funds are distributed to districts of higher need statewide.

RECOMMENDATIONS:

1. **Increase state share of education funding.** Virginia's state-level contributions to education rank in the bottom ten states in the nation (#41), leaving nearly 60% of non-federal school dollars in Virginia to come from localities.¹⁷ This proportion is significantly

¹³ Current Virginia Code § 22.1-287.03(B) Unique Student Identification Numbers: ... (B) The Department of Education shall develop a system of unique student identification numbers. Each local school board shall assign such a number to each student enrolled in a public elementary or secondary school. No student identification number shall include or be derived from the student's federal social security number. Each student shall retain his student identification number for as long as he is enrolled in a public elementary or secondary school in the Commonwealth.

¹⁴ These include **the Urban Institute**

(https://www.urban.org/sites/default/files/publication/99540/school_district_funding_in_virginia_2.pdf), and the

Education Law Center at Rutgers Graduate School of Education

(https://edlawcenter.org/assets/files/pdfs/publications/Is_School_Funding_Fair_7th_Edit.pdf). Note that the

Education Trust ranks Virginia in the middle of states (<https://edtrust.org/graphs/?sname=Virginia>) funding disparities based on socioeconomic status alone, but ranks Virginia near the bottom in terms of racial disparities of funding.

¹⁵ <https://thehalfsheet.org/post/177487398498/in-funding-high-poverty-schools-virginia-gets-a>

¹⁶ <https://edtrust.org/graphs/?sname=Virginia>

¹⁷ <http://www.nea.org/assets/docs/2019%20Rankings%20and%20Estimates%20Report.pdf>

higher than the national average. This is a problem because local funding is dependent on property values – which align with massive racial disparities from historical government practices. Virginia should consider taking greater state responsibility for funding, particularly for districts with high need.

2. **Reconfigure the state’s “Local Composite Index”** to calculate levels of need and concentration of need. While the current formula considers a locality’s ability to pay, it generally ignores the proportion of high-needs students the district is educating. The Urban Institute suggests the following:

“Virginia could consider how different measures of prosperity and population are weighted when calculating each district’s composite index, whether to cap the required local share and at what level, whether the local share of the state’s poor school-age children should be accounted for in sales tax revenue distributions, whether to fund cost of competing adjusted salaries in selected districts, and the size of various funding streams targeting low-income, special education, and other at-risk students.”¹⁸

Improve school discipline practices.

BACKGROUND: What has come to be called the “School to Prison Pipeline” has been confirmed by multiple long-term studies: students overexposed to exclusionary discipline practice—such as out-of-school suspensions, or court referrals for simple school misconduct—are more likely to drop out of school, fall behind academically, and get caught up in the juvenile justice system later. By relying on exclusionary discipline for relatively minor classroom misbehavior, school actors aggravate and worsen students’ long-term outcomes.¹⁹ Despite a massive increase in Virginia’s student enrollment numbers, support staff numbers have dropped in the last fifteen years, with a corresponding increase in exclusionary discipline use.²⁰ The damaging consequences of this trend are overwhelmingly felt by students of color. For example, Virginia’s unusually high use of police officers to manage behavior in classrooms (one of the top 3 states in the nation) falls far more harshly on Black students, who are 2.5 times more likely to have the police called on them from class. Suspensions are also used disparately: as of 2018, Black students were 4.5 times more likely than their white classmates to be suspended from school.²¹

RECOMMENDATIONS:

1. **Repeal Classroom Disorderly Conduct Statute.** This law explicitly criminalized classroom misbehavior and was repeatedly used by school actors to send children from classroom to courtroom. While classroom management and school safety are essential, the state

¹⁸ https://www.urban.org/sites/default/files/publication/99540/school_district_funding_in_virginia_2.pdf

¹⁹ http://knowledgecenter.csg.org/kc/system/files/The_School_Discipline_Consensus_Report.pdf

²⁰ <https://www.justice4all.org/wp-content/uploads/2018/08/Investing-in-Student-Safety-and-Success.pdf>

²¹ <https://www.justice4all.org/wp-content/uploads/2018/10/FullSuspendedProgress2018.pdf>

must give schools a different tool. This statute was repealed in 2020 and is expected to be signed.

2. **Impose stronger statutory limits on out-of-school suspension.** Up until 2018, Virginia allowed out-of-school suspensions to last an entire year—a massive amount of learning loss. In 2018, limitations on long-term suspensions were shortened to 45 days, and K-3 suspensions were limited to three days.²² Note that the long-term suspension limit could be shortened even further. New York city, for example, has a 20-day limit.²³
3. **Develop Standards on In-School-Suspension and Student Resource Centers.** There do not appear to be statutes in Virginia requiring—or even encouraging—schools to provide *In-School Suspension* (ISS), an alternative disciplinary option.²⁴ Though the quality of In-School Suspension options can vary, as a general policy independent learning continues in a structured setting in the school, and family work patterns are not interrupted, scholars consider ISS a less harmful alternative to out-of-school suspension (OSS). In addition, students generally view ISS as “punishment” rather than “vacation,” which may increase its effectiveness as a sanction. In some states, districts provide district-wide School Resource Centers, which tread a middle ground. At Resource Centers, trained counselors and alternative teachers work with small groups of students who have violated school rules to prepare them to return to the traditional classroom.²⁵ Requiring these or other interventions as alternatives, and using research to inform or require evidence-based approaches to these alternatives would be a further step to reduce the number of children generally, and children of color specifically, who are pushed out of school.

Increase course access for all children.

CONTEXT: All children deserve enriched learning experiences and curricula that adequately challenge them and prepares them for long term studies. Virginia’s advanced courses, such as gifted and AP courses, disproportionately leave out students of color. White students are 2.1 times more likely to be enrolled in a gifted or AP course than Black students, and 1.9 times more likely than Hispanic students.²⁶ There are several potential reasons. First, students are not being identified or counseled to take advanced courses in the first place.²⁷ Second, their families are

²² https://www.richmond.com/news/local/government-politics/northam-signs-student-discipline-reform-bills-as-virginia-schools-still/article_ee156e85-43b8-59ce-be13-e767818e9b91.html

²³ <https://chalkbeat.org/posts/ny/2019/06/20/nyc-is-capping-suspensions-at-20-days-a-major-victory-for-discipline-reform-advocates/>

²⁴ <https://safesupportivelearning.ed.gov/sites/default/files/discipline-compendium/Virginia%20School%20Discipline%20Laws%20and%20Regulations.pdf>

²⁵ For a useful comprehensive literature review of OSS and ISS studies, visit:

<https://www.healthiersf.org/RestorativePractices/Resources/documents/suspension%20ineffective.pdf>

²⁶ <https://projects.propublica.org/miseducation/>

²⁷ https://www.pilotonline.com/news/education/article_9d576f91-7b15-5adc-8bea-9ffd39d0bc7b.html

unable to pay private costs required to advocate through the appeals process.²⁸ Third, students of color disproportionately attend under-resourced schools that do not offer advanced courses.

RECOMMENDATIONS:

1. **Cultural sensitivity training for gifted identification process.** If giftedness shows up in students at about the same rate, regardless of race, then schools are failing to identify about half of Black and Hispanic students. Charlottesville is currently revamping its gifted identification process to resolve this problem. If the city is successful, it may be able to expand its procedure to other cities.
2. **Reform the gifted appeals process.** In Northern Virginia in particular, many wealthy families have their children privately identified as gifted (at the cost of at least several hundred dollars), then appeal the school's initial decision, ultimately succeeding on getting their children into advanced programs. But many families of color often cannot afford such expensive exams or appeals processes. If the state offers gifted programming, it must reform the identification and appeals processes to remove the inherent advantage to certain families. See regulations at 8VAC20-40.
3. **Checks on bias in career counseling and guidance.** Virginia middle schoolers receive career counseling and are expected to build life plans. In addition, guidance counselors in high school help students choose the best diploma option for their life goals. Somehow, in this process, Black and Hispanic students are ending up with worse diplomas and worse options. According to a New York Times expose, this may actually be due to biased counseling.²⁹ The Board of Education may consider adding language to the career counseling and diploma regulations to combat this trend. See regulations at 8VAC20-131-140. See diploma regulations at 8VAC20-131-51.

²⁸ <https://www.businessinsider.com/ap-school-systems-appeals-process-leaves-some-minorities-out-2018-2>

²⁹ <https://www.nytimes.com/2018/10/16/us/charlottesville-riots-black-students-schools.html>

CRIMINAL JUSTICE

As in the education area, the racial disparities in Virginia's criminal justice system are pronounced and pervasive. And, as with education, we recognize that multiple factors and state and local actors contribute to these disparities in a way that poses challenges to simple legislative solutions. These recommendations do not claim to tackle all of the areas where such disparities exist, nor solve all of the problems in the specific areas addressed. They do, however, represent tangible proposals for the Commission to consider that will begin to either directly address some of the identified problems or give policy makers greater tools to take on these issues over time.

This session resulted in multiple encouraging steps forward in criminal justice, steps that may also help reduce some of the existing racial disparities in Virginia's criminal justice system. These legislative changes include statutes that:

- Make eligible for parole any offender convicted of an offense as a juvenile who has served 20 years in prison (HB 35/SB 103)
- Raise the grand larceny value of goods threshold from \$500 to \$1000 (HB 995/SB 788)
- Raise the age of juvenile transfer to adult courts from 14 to 16 (HB 477)
- Allow a sentencing court to depart from mandatory minimums for juveniles tried as adults (HB 744)
- Decriminalize simple marijuana possession and provide a civil penalty of no more than \$25 (HB 972)
- Allow for more than one filed writ of actual innocence per case and increases eligibility criteria for filing said writs (HB 974)

POLICY RECOMMENDATIONS

[Address data gaps throughout the criminal justice process.](#)

BACKGROUND: As highlighted throughout this presentation, Virginia lacks adequate data on racial disparities at each step in the criminal justice process, particularly in the pre-trial and sentencing phases. Having this data is essential to making more substantive policy recommendations.

RECOMMENDATIONS:

1. **Require the Sentencing Commission to collect, analyze, and report on sentencing outcomes by race and ethnicity.** We know that while the black prison population is vastly overrepresented compared to the general population of black Virginians, and the State Police provide a robust data source regarding arrest rates, there is no data about sentencing itself. While there is no statutory ban of the use of race in the sentencing recommendation process, the Virginia Criminal Sentencing Commission has shied away

from using race in the sentencing algorithms it employs, which we commend. But there ought to be room for tracking the race of a sentenced person without using it as a factor in their sentencing guidelines. Without making note of race at all on the sentencing forms used to compile the Sentencing Commission's reports, there is no ability to report on race when asking questions like, "Are there offenses for which black defendants are more likely to receive prison terms than white defendants?" or "How often did a judge depart from the Sentencing Commission's discretionary sentencing guidelines for white defendants compared to black defendants?"

To that end, § 17.1-803(10), currently reads:

[The Commission shall] [r]eport upon its work and recommendations annually on or before December 1 to the General Assembly, the Governor and the Chief Justice of the Supreme Court of Virginia. Such report shall include any modifications to the discretionary sentencing guidelines adopted by the Commission pursuant to subdivision 1 and shall be accompanied by a statement of the reasons for those modifications.

We propose adding language to require the Sentencing Commission to collect, analyze, and report on sentencing outcomes by race and ethnicity.

2. **Require the collection of data on the results of pretrial hearings, bail decisions, and pre-trial incarceration, including breakdowns by race.** In the same way that the Sentencing Commission has shied away from using race, the Virginia Pretrial Risk Assessment Instrument (VPRAI) also prohibits the use of race. The Virginia State Crime Commission has taken valuable steps to study pre-trial outcomes through the Virginia Pre-Trial Data Project. We encourage further study of racially-disparate outcomes in particular, as well as expansion of the project to other jurisdictions, which is in line with and in addition to the recommendation of the Pre-Trial Data Project to "request that Crime Commission staff convene stakeholders to develop a plan for statewide data systems integration...." Similar to the above, we encourage this Commission to identify ways that the Virginia Department of Criminal Justice Services can continue to deploy a race-agnostic VPRAI without limiting the ability of DCJS to evaluate equal or unequal VPRAI outcomes based on race.

Further, magistrates provide little to no data insight regarding the actual use of the VPRAI, as well as bail outcomes, pretrial sentencing, and demographic data related to that sentencing. A new statute requiring magistrate data be made publicly available would act to increase transparency and, hopefully, increase trust between the public and this slice of the criminal justice system. It would also allow the Commission to further study the impact of race on bail decisions and pretrial incarceration.

To address both of these goals, we propose introducing a new section in Title 19.2 Chapter 9 that requires all magistrate judges to provide data about each pretrial hearing decision, including bail amounts, recognizance decisions, and whether the defendant is placed in pretrial incarceration. Magistrate reports to DCJS should also include the race and ethnicity of the defendant in each case and any data about the use of the VPRAI in that hearing. In addition, the new code section should include a requirement for DCJS to annually publish this data in aggregate.

The legislature did consider part of this effort with HB 922, which would have required DCJS to collect data relating to bail determinations for any person who is held in custody pending trial or hearing for an offense, civil or criminal contempt or otherwise, in every locality, create a uniform reporting mechanism for criminal justice agencies to submit such data, and submit an annual report on the data collected to the Governor and the General Assembly, as well as publish the annual report on the Department's website.

We encourage the Commission to support a similar effort, and perhaps go a step further, by incorporating explicit references to the need to understand how whether those decisions fall along racial lines.

Support increased diversion efforts.

BACKGROUND: The “Compensation Board Criteria for Allocating New Assistant Commonwealth’s Attorney Positions in Commonwealth’s Attorneys’ Offices” says, “The Compensation Board will use the staffing methodology and weighted three-year average workload criteria developed by the Virginia Association of Commonwealth’s Attorneys (VACA), to determine the appropriate level of Compensation Board assistant Commonwealth’s Attorney support for each office requesting additional positions.” That formula is:

$$\frac{\text{\# of Attorneys} = \text{Workload Total (3yr avg felony defendants + 3yr avg sentencing events)}}{\text{Factor}}$$

where the “Factor” shifts the recommended new attorney count based on an assessment of economies of scale in an office of a given size.³⁰

What this means in practice is that Commonwealth’s Attorneys’ Offices are provided staffing funds based on the number of felonies they try in a given year, incentivizing the felonization of defendants, while discouraging diversion or sentencing de-escalation. This contributes to overincarceration in Virginia, and given how much incarceration has disproportionately impacted black Virginians, changing this policy might help swing the pendulum in the other direction.

³⁰ “Compensation Board Criteria for Allocating New...,” amended June 25, 2014, <https://www.scb.virginia.gov/docs/fy19staffstd772.pdf>

RECOMMENDATION:

1. **Prevent the Compensation Board from considering the volume of felony cases when calculating Commonwealth's Attorney office resourcing.** While the current criteria for staffing are not statutorily defined, the Compensation Board's composition and general behavior are (see § 15.2-1636.5 and § 15.2-1636.8, respectively). We recommend amending § 15.2-1636.8 to prohibit the Compensation Board from considering the number of felony counts pursued by an office when determining new Assistant Commonwealth's Attorney positions, or any other criterion that might discourage a Commonwealth's Attorney from pursuing diversion for some or all of its caseload. The General Assembly did consider a similar reform this session in HB 1035/SB 803, but both houses continued the bill to 2021.

Address the impact that mandatory minimum sentencing laws have on racially disproportionate rates of incarceration.

BACKGROUND: As detailed in the accompanying PowerPoint presentation, a disproportionately high rate of incarcerated people in Virginia are black. Given the high number of felony offenses carrying mandatory minimum sentences it is important for Virginia to both understand the relationship between mandatory minimum sentences and these disparities and then to take legislative steps to address this problem.

RECOMMENDATION: Given the depth of criminal justice experience and expertise among various members of the Commission, we defer from making a specific recommendation at this point. However, we would note that there were efforts this General Assembly Session, such as SJ 34, that would have directed the Virginia State Crime Commission to study this issue, that are worthy of the Commission's review.

VOTING

The members of the Commission identified voting as a priority area even while recognizing that this General Assembly session would be an active one for voting rights. Accordingly, our main goals in this section are to: 1) Provide an overview of some of the major legislative changes this session; 2) Recommend a change to the Virginia Constitution; and in 3) Identify gaps in the available data to uncover areas that may require additional attention in the future.

To begin, we note some of the most important voting changes that **successfully passed the 2020 General Assembly**, including those predicted to be signed by Governor Northam:

- **HB 1:** Absentee voting; no excuse required (Permits any registered voter to vote by absentee ballot in any election in which they are qualified to vote).
- **HB 108:** Legal holidays; Election Day (Designates Election Day, the Tuesday after the first Monday in November, as a state holiday and removes Lee-Jackson Day as a state holiday. This bill is identical to **SB 601**).
- **SB 65:** Voter identification; repeal of photo identification requirements (Removes the requirement that voters show a form of identification containing a photograph in order to be allowed to vote).
- **HJ 615:** Constitutional amendment; Virginia Redistricting Commission (Establishes the Virginia Redistricting Commission, a 16-member Commission tasked with establishing districts for the United States House of Representatives and for the Senate and the House of Delegates of the General Assembly).

However, two important bills did not pass this session:

- **HB 215:** Voter registration; preregistration for persons age 16 or older (permits a person who is otherwise qualified to register to vote and is 16 years of age or older, but who will not be 18 years of age on or before the day of the next general election, to preregister to vote).
- **HB 219:** Voter registration; automatic voter registration. (Provides for the automatic electronic transmission of registration by the Department of Motor Vehicles to the Department of Elections).

POLICY RECOMMENDATIONS

[End constitutional felony disenfranchisement.](#)

BACKGROUND: Felony disenfranchisement has historically been used as a targeted means to strip Black Americans of their rights to be active civic participants. While modern laws may more broadly impact other racial communities, the Black community still suffers disproportionately under felony disenfranchisement. Many states have moved away from Virginia's strict iteration of such laws, and it would be a move in the right direction if Virginia followed suit.

RECOMMENDATION:

1. **Abolish or limit felony disenfranchisement by amending or repealing Article II, Section I of the Virginia Constitution.**³¹ Perhaps the most ambitious recommendation, it is still overwhelmingly necessary considering the immense harm felony disenfranchisement inflicts on the Black community. The current process leaves the opportunity to vote for disenfranchised Virginians at the whim of whatever governor is in office, which is too great a risk to take considering how integral the right to vote is to a well-functioning democracy. Article II, Section I of the Constitution has gone through a number of changes throughout the years, so changes are definitely possible. Some possible changes for the Commission to consider recommending to the Governor include, but aren't limited to: repealing the provision altogether or automatically restoring the rights of those who have completed their prison sentences.

Pursue further research and address data gaps.

BACKGROUND: Access to voting encompasses more than just accessibility on its face – there are various elements that could hinder one's ability to vote that might not be as intuitive to anticipate. Insight into what these obstacles to voting may be, especially for minority communities, would offer a roadmap for Virginia on the type of data it should start to collect.

RECOMMENDATIONS:

1. **Survey Virginia's minority community.** Using national data, we were able to find specific areas within the voting experience that disparately impacted minority communities beyond specific laws.³² This type of data is notably missing for Virginia. While much can be learned by following national trends, Virginia has a distinct history with its minority community and, therefore, should seek more targeted reforms. Some offices that could collect more information and aid the research process include, but are not limited to, the following state actors:
 - Virginia Department of Elections
 - Virginia Department of Corrections
 - Local Offices of Elections
2. **Consider broader questions and implications.** Recent legislative advances have addressed many voting obstacles that stem from explicit laws. While laws present their own obstacles, the likely inequity in Virginia's voting process requires broader inquiries into what the full extent of obstacles for minority voters may be. Some possible data points that could be collected to gain better insight are the following:

³¹ Constitution of Virginia, Article II, Section 1: Qualifications of voters. “. . . No person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority. . . .”

³² For a list of policy recommendations that address these national issues, See The Center for Progress Action Fund's The Health of State Democracies Report, pg. 59-65.

- Wait time at polling sites, collected per election
- Feedback regarding polling experience, collected per election
- Travel times to and from polling sites, collected per election
- Cost of traveling to vote, per election
- Racial Demographics of those convicted of felonies, collected annually
- Racial Demographics of those whose voting rights were restored, collected annually

If researchers or government agencies pursue these lines of inquiry we recommend that special priority should be given to recording the minority voting experience.
